**International Arbitration (Or Lack Thereof) In the WTO**

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## INTRODUCTION

Parties often prefer arbitration to traditional court proceedings for a variety of reasons. Arbitration is frequently viewed as quicker, less expensive, and less disruptive. The discreet nature of arbitration is highly valued, especially by corporations who often wish to protect themselves from bad publicity or the dissemination of trade secrets. International arbitration, while benefiting from all the above-listed characteristics, is favored over court proceedings primarily for an entirely unrelated reason. Various issues regarding jurisdiction, neutrality and enforcement give international arbitration a virtual monopoly in transnational dispute resolution.[1] While each party likely would prefer to settle disputes in its own court system, both would prefer neutral arbitration to settling the dispute in the *opposing party's* court system.[2]

In the World Trade Organization ("WTO"), under the GATT[3]/WTO agreements, all disputes are international by default.[4] There is no private right of action.[5] Only

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[1] Jan Paulsson, *International Arbitration Is Not Arbitration*, Stockholm International Arbitration Review 2008:8, 16

[2] *Id.*

[3] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. *See also* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[4] Robert Z. Lawrence, *The United States and the WTO Dispute Settlement System* 10 (2007).

[5] *Id.*

national governments have standing to bring claims under the GATT/WTO agreements — and actions may only be brought against other national governments.[6] Furthermore the Dispute Settlement Understanding[7] ("DSU") embraces arbitration of disputes to various degrees.[8] But in spite of the necessarily transnational character of arbitration under the WTO, it is not *international arbitration.* Dispute settlement in the WTO is a process that might best be described as a tribunal that combines a strange form of arbitration with an institutional judicial review.

Decisions and recommendations of the WTO Dispute Settlement Body ("DSB") are not enforceable by national courts. Considering the phenomenal success of the New York Convention[9], it seems natural that WTO member states would make use of that treaty to give structure and force to its dispute settlement mechanism. Why reinvent the wheel when a highly effective international dispute settlement structure is already in place? But, on the contrary, arbitration within the WTO is designed to be international arbitration that is decidedly not *international arbitration.* The NY Convention does not apply to arbitral decisions rendered under WTO agreements.

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[6] *Id.*

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[8] Articles 21.3(C), 23.6, 23.7, 25 and 26.1 of the DSU deal with arbitration. *See also* Articles XXI and XXII of the General Agreement on Trade in Services and Articles 4.11, 7.10 and 8.5 of the Agreement on Subsidies and Countervailing Measures.

[9] More formally known as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959. As of February 2009 it has been adopted by 142 of 192 United Nations Member States.

This gives rise to a series of questions. Why did not the WTO members take advantage of traditional international arbitration when fashioning the DSU? What could be gained (or lost!) by fashioning such a system? Would traditional international arbitration work within the WTO framework? Would it be an improvement? To these questions some, such as Georgios Zekos, have called for an overhaul of the current WTO system in favor of one using traditional international commercial arbitrations.[10] But would this be wise?

**WHY INTERNATIONAL ARBITRATION?**

Arbitration is the private adjudication of a dispute based on an agreement between the parties to the dispute.[11] Parties agree to arbitration in one of two ways. They either agree to submit future disputes to arbitration, or they agree to submit a dispute to arbitration after it has arisen.[12] The former is effected by an arbitration clause in a contract ("clause compromissoire"), the latter by a submission agreement ("compromise") after a dispute has emerged.[13] The majority of international arbitrations today are the result of contractual arbitration clauses.[14]

Several distinctive features set arbitration apart from other forms of dispute resolution, particularly from traditional judicial remedies. These features include: speed

[10] Georgios Zekos, *An Examination of GATT/WTO Arbitration Procedures*, 54 Dispute Resolution J. 72 (November, No. 4, 1999).

[11] Christian Bühring-Uhle et al., *Arbitration and Medition in International Business* 32 (2d ed. 2006).

[12] *Id.*at 33

[13] *Id.*

[14] *Id.*

and efficiency, party-selected arbitrators, res judicata, confidentiality, as well as (and especially) enforceability. Keep these features in mind, as they will be revisited further on in this paper.

**Speed and Efficiency**

Since by definition arbitration is the result of agreement between the parties, many procedural issues that would consume time in a court system do not exist in an arbitration context—parties have already agreed the issues away. Parties are free to adopt almost any set of procedural rules.[15] Time limits may be set by the parties.[16] Choice of law (procedural and substantive) and choice of venue may be decided[17]; all this and more is often done before any dispute arises.[18] For these reasons arbitration is often much more flexible and less expensive than bringing a traditional court action.

**Selecting Arbitrators**

Unlike a typical judicial system, where a party has little control over whom will be appointed to hear his case, parties to an arbitration choose their own arbitrators.[19] This is done in a number of ways. Ideally, a single arbitrator will be acceptable to both parties. This is the least common scenario, however.[20] Procedures for selecting

[15] Kaj Hobér, *Essays on International Arbitration* 259 (2006).

[16] *Id.*

[17] *Id.*

[18] *See supra* note 10.

[19] Hobér, *supra* at 259.

[20] Bühring-Uhle, supra at 73-74.

arbitrators are often laid out in arbitration agreements. For example, in the case of a three-arbitrator panel, it is common for the parties to select one arbitrator each; those arbitrators then jointly appoint a third arbitrator who acts as chairman.[21] In case the parties are unable to agree to arbitrators, many arbitration institutions have mechanisms in place for selecting arbitrators.[22]

Two important consequences flow from having the parties name arbitrators. *First* it introduces the potential for bias. A party may be inclined to appoint an arbitrator who is predisposed in the appointing party's favor for an inappropriate reason—perhaps due to a shared nationality. Although arbitrators should always act in their individual capacities, and not as agents for their nominating party,[23] the party may be tempted to tilt the proceeding in his favor by naming a biased arbitrator.

*Second*, naming arbitrators can ensure that the dispute is heard by subject-matter experts. In terms of qualification, arbitrators are typically not limited by anything other than agreement by the parties to the dispute.[24] They need not be judges or even have legal training. Thus parties can appoint a panel with the expertise, experience and background, whether legal or otherwise, necessary to address the issues of the claim competently.[25]

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[21] *Id.* at 74.

[22] E.g., under International Chamber of Commerce arbitration rules the ICC Court delegates the selection of arbitrators to a national ICC committee. (See Art. 9.3 ICC Rules).

[23] Hobér, *supra* at 259-60.

[24] *Id. at 259*.

[25] *Id.*

**Res Judicata**[26]

Foreign Arbitral awards typically cannot be appealed.[27] The decision of the arbitrator is final and binding on the parties. This obviously contributes to the speed and efficiency of the proceeding, but when combined with the New York Convention it protects parties in far more important ways. Unlike foreign court judgments, which have no legal force outside the jurisdiction in which they are rendered, arbitral awards are recognized as binding by every signatory to the New York Convention.[28] It is worth noting that here lies a substantial difference between *arbitration* and *international arbitration.* The New York Convention applies only to *foreign* arbitral awards.[29] Domestic arbitral awards are governed by domestic law; thus we find that such arbitral awards may be subject to appeal in some jurisdictions, as they are in France.[30]

Furthermore, the New York Convention also requires signatories to recognize and give effect to contractual arbitration clauses.[31] Thus, even without the res judicata effect of a binding decision, cases brought before a national court will be dismissed where the complaining party is subject to a binding arbitration clause applicable to the claim.

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[26] The Restatement (Second) of Judgments defines Res Judicata as:

> 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. §§ 17, 24 (1982).

[27] Hobér, *supra* at 260.

[28] *See* Articles III and V New York Convention.

[29] See Article I New York Convention.

[30] Paulsson at 17.

[31] *See* Article II New York Convention.

**Confidentiality**

Finally, commercial arbitration is favored for the confidentiality it affords the parties to the dispute. The discreet nature of private dispute resolution allows the parties more control over who will know of the controversy.[32] The result of the arbitration may also be kept secret[33].

It is easy to see why confidentiality would be desirable in many situations. A large construction firm with a delay and disruption suit against it, for example, might be inclined to pay out a large settlement to the opposing party, even where the suit lacks merit, solely to avoid the publicity and negative impact on the firm's reputation that could result from non-confidential proceedings. The firm does not want potential clients to see news reports suggesting that the firm is incompetent to complete jobs according to contractual schedules.

Companies are especially keen to keep under wraps proceedings that could divulge valuable trade secrets if conducted in open court.[34] Oftentimes a firm will develop some process or product that is novel and highly innovative. The product could be patented, of course, securing for that firm an exclusive monopoly over the sale and distribution of the product. But the patent system is built on quid pro quo. In exchange for the monopoly, the information must be made public so that the product or process can be easily duplicated by anyone else with typical skill in the art. Once the patent expires (20 years from the application date), anybody can make, market and sell an identical

[32] Bühring-Uhle, supra at 175.

[33] *Id.*

[34] *Id.*

product or process. Unlike patents, trade secrets don't expire (as long as they remain secret). Pepsi, for example, does not want to get a patent on its cola recipe, because it wants to be the only firm capable of selling a drink that tastes exactly like Pepsi Cola for far longer than the 20-year patent monopoly provides. A dispute in which Pepsi was required to divulge its secret cola recipe could be disastrous for the company.

And, of course, companies may simply wish to avoid showing signs of tort liability. A public suit against a company, especially one that the company loses, can often breed more suits. And once liability is proven in one case, another claimant may only need to show damages, with half his casework already done for him.

**Enforceability Under the New York Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, is often described as the most successful treaty in the history of private international law. As of October 2009, 144 countries were signatories to the convention, including 142 of 192 members of the United Nations.[35] The New York Convention has two primary functions. It requires member states to give effect to private agreements to arbitrate and it requires states to recognize and enforce arbitral awards made in the territory of a state other than the state where the recognition of the award is sought.[36]

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[35] New York Arbitration Convention, Section on contracting states, available at http://www.newyorkconvention.org/new-york-convention-countries/contracting-states (last visited November 17, 2009).

[36] Articles II and III of the New York Convention *available at* http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html (last visited November 23, 2009).

Each of these two functions has profound impacts on international commercial dispute resolution. The recognition of an agreement to arbitrate gives parties to a contract a quick solution to a lawsuit on the contract brought in the opposing party's home state (or the courts of any state, for that matter). On a showing of the *clause compromissoire* the court should make no findings of fact or law and simply refer the case to arbitration. The New York Convention effectively destroys that court's subject matter jurisdiction.

This facilitates international trade inasmuch as the first choice for dispute resolution between two foreign parties to an international commercial contract is likely going to be the court system within each party's respective home country. A party's own courts are likely to share similar ideals, socialization, culture. There may be a natural nationalistic bias for the court's own citizen vis-a-vis a foreigner. The party in his home country will likely have a distinct linguistic advantage as he litigates in his mother tongue. And the party has already paid for the courts with taxes, so no expensive arbitrators would be necessary. But while each party's first choice is probably the courts of his home country, that probably is the least palatable choice to the other party for all the above listed reason. Absent the New York Convention, the prospect of having to defend oneself in a foreign forum would likely preclude many foreign parties from conducting business together.

In essence, the New York Convention provides neutrality. While each party would likely prefer a system slanted in its own favor, that would be intolerable to the opposing party. The New York Convention allows for a neutral forum, with neutral arbitrators, taking home-court advantage out of the equation.

This is, of course, only half of the equation. Suppose that the New York Convention did not exist and a German party pulls an Austrian into its court system much to the jurisdictional protests of the Austrian party. And suppose that the German party wins a judgment against the Austrian. The German has won. He has his judgment. It is over. Now he has but to collect from the Austrian. And herein lies the problem. The Austrian has no property in Germany. It matters little whether the German courts legitimately exercised jurisdiction over the Austrian. It matters little whether they have the authority to order payment. In the end, they lack the power to effect the payment. In order to collect, the German must now take his judgment to Austria, and between the two parties, the German no longer enjoys a home-court advantage. If the Austrian courts agree with their compatriot that the German courts lacked jurisdiction over the Austrian citizen, the judgment is worthless. It is not only worthless, but it has negative value because it was procured at great litigation expense. Moreover, even if the Austrian courts agree that the German courts exercised legitimate jurisdiction they may refuse to enforce the judgment solely on reciprocity grounds. Perhaps German courts have a policy of refusing to enforce Austrian judgments and on these grounds alone Austrian courts are more than happy to return the favor.

Fortunately this is not the commercial world we are forced to live in. The New York Convention enables international arbitration as an alternative to this judicial quagmire. When the German party attempts to litigate the dispute in his home state, the Austrian need only show the court the arbitration agreement in the contact and the case

will be dismissed. And when the German party prevails in arbitration and puts himself at the mercy of the Austrian judicial system, his arbitral award will be enforced post-haste.[37]

## DISPUTE RESOLUTION IN THE WTO

### History — From GATT 1947 to GATT 1994 and the WTO.

Initially, dispute resolution under GATT centered on the negotiation of bilateral arrangements, assessed by the parties to the dispute. This led to a great deal of uncertainty and non-uniformity from one case to another. Over time, as nations sought consistency and an environment more conducive to international trade, they moved toward a system based on legal procedures and norms.

The WTO got its conceptual start with a series of bilateral trade agreements based on the unconditional application of the concept of Most Favored Nation ("MFN").[38] [39]

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[37] Article V of the New York Convention lists defenses to enforcement of an arbitral award where a party against whom an award is invoked can prove that:

1. The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
2. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
3. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
4. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
5. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
6. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
7. The recognition or enforcement of the award would be contrary to the public policy of that country.*

*Note: Items 6 and 7 may be based on a finding on the enforcing court's own initiative without requiring a request from either party.

When the original GATT was drafted as part of the proposed International Trade Organization ("ITO"), these bilateral trade agreements provided much of the GATT's conceptual framework.[40] At the time, dispute settlement was not a primary concern of governments involved.[41] Article XXII and XXIII of the GATT 1947 were drafted to deal with dispute resolution under that agreement. Those articles focus primarily on consultation between the parties to reach a diplomatic resolution.[42] There was no set mechanism for settling disputes where diplomacy failed.

**Hints of Arbitration**

Shortly after the GATT text was finalized, negotiations took place regarding a much more comprehensive system for the settlement of disputes in the proposed International Trade Organization (of which GATT was meant to be a part). Chapter VIII of the Havana Charter was a rules-based (as opposed to primarily diplomatic) approach to the settlement of trade disputes within the ITO. It even allowed a Member to request an advisory opinion from the ICJ,[43] which would have been binding on the Organization.[44]

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[38] Merit E. Janow, *The WTO: Governance, Dispute Settlement & Developing Countries* 323 (2008).

[39] Most favored nation is too rich a subject to be treated with any kind of depth in this paper. In grossly simplified terms MFN is a status given by one nation to another. The receiving country is then entitled to trade advantages no less favorable than any other nation receives from the grantor. Thus, if the US grants Mexico MFN status, the US cannot lower tariffs on a particular import coming from another country unless any higher tariffs on like products imported from Mexican are lowered to match. For an excellent treatment on most favored nation, *see* Jackson et al., *Materials and Texts on Legal Problems of International Economic Relations* 467-96 (5th ed. 2008).

[40] Janow, *supra* at 323.

[41] *Id.*

[42] *Id.*

[43] International Court of Justice

[44] Janow, *supra* at 324.

The Charter also allowed for the resolution of inter-state disputes through arbitration. Article 93 provided that, "If any Member considers that any benefit accruing to it . . . is being nullified or impaired . . . [the Members] concerned may submit the matter arising under paragraph 1 to arbitration upon terms agreed between them . . . ."[45] The ITO, however, failed to gain the support it needed to become a legitimate international organization, and failure of the ITO to materialize also meant the demise of the Havana Charter.[46]

Approximately fifteen years after the GATT went into effect (upon the failure of the ITO) the panel system was adopted.[47] Ten years later the panel in *Uruguay — Recourse to Article XXIII*[48] took the next major step toward a system based on legal procedures and norms. It set out a "presumption of nullification or impairment of benefits when a GATT violation has been found."[49] This was an important development. Prior to this development a country could not be brought before the dispute settlement mechanism merely for taking actions inconsistent with GATT obligations. Such inconsistent actions were irrelevant unless another member nation could show that it was prejudiced somehow. In other words, nullification and impairment of a benefit to another Member was a necessary condition of bringing a claim.[50] The presumption of

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[45] UN Doc. E/Conf.2/78.

[46] Janow, *supra* at 324.

[47] *Id.*

[48] Panel Report, Uruguayan Recourse to Article XXIII, adopted 16 November 1962, BISD 11S/95

[49] Janow, *supra* at 324.

[50] Article XXIII GATT reads:

1- If any contracting party should consider that any benefit accruing to it directly or indirectly under

nullification or impairment when a GATT violation has been found made it so that an action inconsistent with GATT obligations, while still not a necessary condition for triggering formal dispute resolution, is at least a sufficient one. Further reforms throughout the years continued to move GATT dispute resolution in the direction of a legal-based system up until the Uruguay Round and the creation of the WTO.[51]

**The WTO and the Dispute Settlement Understanding**

The Uruguay Round was launched in 1986.[52] The volume of commitments being negotiated was staggering, and it quickly became clear that the existing dispute settlement regime would be inadequate.[53] A new, more robust system was implemented with the advent of the WTO (which incorporates the GATT 1947 agreement in whole) and DSU in 1994.

**The DSU — A to Z**

Dispute resolution under the WTO typically divides into three stages, 1) consultation, 2) panel and Appellate Body proceedings, and 3) if an inconsistency with a

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this Agreement is being nullified or impaired or that the attainment of any objective of the agreement is being impeded as the result of

a. the failure of another contracting party to carry out its obligations under this Agreement, or
b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
c. the existence of any other situation.

[51] *Id.*

[52] Valerie Hughes, *Arbitration Within the WTO*, *in* PREPARING THE DOHA DEVELOPMENT ROUND: IMPROVEMENTS AND CLARIFICATIONS OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 100, 103 (Ernst-Ulrich Petersmann ed., 2002).

[53] Janow, *supra* at 325.

covered agreement was found, implementation of the report by the losing party.[54] Failure to abide by the panel/Appellate Body recommendations can trigger a 4th stage — consultation between parties and possible arbitration to determine appropriately responsive suspension of concession measures.[55]

This mechanism resembles international arbitration in many ways, but is in many ways very different. Panels are established by parties in much the same way as tribunals in many arbitrations.[56] Panel members are chosen by parties with an eye toward professional, technically competent panelists.[57] If agreement on panelists cannot be had between the parties, the WTO Director General will fill any vacancies.[58] On the other hand, unlike arbitration, which is triggered automatically when a dispute arises under a contract with an arbitration clause, WTO dispute settlement panels must be preceded by consultation and good-faith attempts of conciliation.[59] In traditional arbitration, if no exhaustion-of-other-available-remedies provisions are specified within the arbitration agreement itself, no such prerequisite will bar bringing a claim to arbitration.

Panels then examine the claim and there is an interim review stage in which parties are allowed to comment.[60] The panel issues a report which can be appealed to the

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[54] Jackson, *supra* at 151.

[55] Hughes, *supra* at 108. *See also* Articles 21 and 22 DSU.

[56] Eduardo Pérez Motta & Mateo Diego-Fernández, *If the DSU is "Working Reasonably Well", Why Does Everybody Want To Change It?, in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 293, 306 (Dencho Georgiev and Kim Van der Borght eds. 2006).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Jackson, *supra* at 152.

Appellate Body.[61] The final report is then adopted by the Dispute Settlement Body (which consists of WTO Members)[62] unless there is consensus not to adopt the report.[63] Unchallenged panel decisions, and all Appellate Body decisions, are legally binding.[64]

Finally, in cases of non-implementation—where a losing party fails to bring its practices and laws into compliance with GATT obligations—there is a possibility of arbitration on the narrow issue of how much, if any, retaliation (suspension of trade-barrier concessions) is appropriate.[65] Compensation to the complaining party is also possible, but only upon agreement by both parties.[66] Note that retaliatory measures are meant to be temporary. Their purpose is to put domestic pressure on the offending nation to bring its practices into compliance with its WTO obligations.[67]

**The DSU in Perspective**

The changes in the dispute settlement system from GATT 1947 to the WTO/DSU were numerous, but as Robert Lawrence pointed out in his 2007 study of the DSU, a few features merit particular emphasis. *First*, the WTO does not have a policing mechanism.[68] It neither instigates proceedings nor conducts investigations on its own.[69]

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[61] *Id.* at 153

[62] *Id.*

[63] In practice there is never consensus to not adopt a report because the winning party has a vote.

[64] Jackson, *supra* at 154.

[65] *Id.* at 152.

[66] *Id.* at 154

[67] Lawrence, *supra* at 11

[68] *Id.* at 10.

Enforcement of obligations under GATT agreements is entirely up to the various Members, who may fail to bring an action against another Member for diplomatic reasons.[70] This is one of the many examples of the focus on principles of sovereignty taken by the DSU. The DSU is not an organization that attempts to police or punish the actions of the WTO sovereign-state members.

*Second*, the WTO is a distinctly *intergovernmental* organization.[71] Private parties cannot bring actions against Members, and cannot participate in actions, except by the submission of amicus briefs (and even then only at the discretion of the panel).[72] If a private party is harmed by a trade measure taken by another country, the private party must operate through and be represented by its government to have any recourse to the WTO dispute settlement process. Once again, this is an example of respect to the principles of sovereignty and sovereign immunity underlying GATT and the DSU. This foundation of sovereignty sheds light on some of the perceived shortcomings of the WTO and its dispute resolution mechanisms.

*Third*, while stare decisis has not been formally adopted, in practice it is very much in force.[73] DSB panels as well as the Appellate body routinely accord great weight to precedents.[74] The written decisions abound with citation to earlier DSB reports. The

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See supra* note 4.

[73] *Id.* at 11.

[74] *Id.*

Appellate Body overtly concerns itself with maintaining consistency in judgments.[75] "Thus, de facto, the DSU has established something approaching a common-law system."[76]

*Fourth*, implementation of WTO rulings is not automatic.[77] While not technically allowed by the agreement, in practice members have discretion as to whether to bring their practices into conformance with WTO obligations.[78] Since retaliation cannot be greater than the initial nullification or impairment, members may choose not to come into compliance, knowing that doing so will not lead to a net economic gain. In other words, if the United States passes a law that impairs a benefit to Mexico in violation of a GATT provision, and a panel ruling recommends that the United States bring its practices back into conformance with its obligations, there is no mechanism of forcing the United States to make such a change (in spite of its legal obligation). If the United States refuses, the DSB can, at most, authorize a suspension of concessions by Mexico that will similarly impair a benefit to the United States. But this suspension is not punitive—it can only go so far as to *temporarily* restore the status quo that existed prior to the United States' violation of its GATT obligations. Thus, the United States might strategically choose to ignore a panel recommendation, preferring the consequences (retaliation) to the legal remedy, since the consequences of refusal cannot be more economically disadvantageous to the United States than the legal remedy would be. For that matter, the United States may ignore the panel ruling simply because its legislature is unable or unwilling to pass a

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

bill implementing the recommended change for any number of reasons ranging from procedural to political.

*Fifth*, as suggested above, the DSB lacks the power to award damages.[79] DSB rulings and recommendations cannot go beyond bringing an offending member back into compliance with its obligations under the WTO agreements. Thus, parties expecting to lose may be encouraged to delay the process as long as possible.[80] They may also take actions inconsistent with their WTO obligations knowing that there will be no more severe consequences than coming back into compliance at a later date.[81] This *later date* is highly significant because in the mean time the violating party may be reaping enormous short-term economic gains or securing a market position that will be later difficult to disrupt even after bringing laws back into compliance with the GATT agreements.

**Arbitration Under the DSU**

The typical dispute settlement measures outlined in the DSU share some similarities with arbitration, e.g., the selection of panels. But the DSU also contains several explicit provisions for the use of arbitration to various extents.

In 1989 the Contracting Parties agreed to "The 1989 Improvements" to the GATT Dispute Settlement rules. The *1989 Improvements* explicitly added arbitration as an alternate form of dispute settlement in certain circumstances.[82] Importantly, under this

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Paragraph E of the April 1989 Decision on Improvements to the GATT Dispute Settlement Rules and

agreement, arbitration awards were to be "consistent with the General Agreement," and could not "nullify or impair benefits accruing to any contracting party."[83]

Between 1989 and April 1994 (when the GATT 1994 and the accompanying DSU went into effect), resort to arbitration under the *1989 Improvements* was uncommon. First, the *1989 Improvements* did not function like a binding arbitration clause in a contract. So the first attempt at employing arbitration under these rules failed. In 1988 and 1989, when the European Community proposed arbitration with the United States, the proposal was quashed when the United States simply rejected it. Over the next few years arbitration was used or proposed in only a few instances.

Although member states showed a distinct reluctance to resort to arbitration to resolve trade disputes, arbitration still found its way into Article 25 of the DSU, largely unchanged from the *1989 Improvements.*[84] Like arbitration under the *1989*

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Procedures reads:

1. Expeditions arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all contracting parties sufficiently in advance of the actual commencement of the arbitration process.
3. Other contracting parties may become party to an arbitration proceeding upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceedings shall agree to abide by the arbitration award.

[83] Paragraph B of the April 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures.

[84] Article 25 of the DSU reads:

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
3. Other Members may become a party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any member may raise any point relating thereto.

*Improvements*, arbitration awards under the DSU must be consistent with the GATT—they must not nullify or impair benefits accruing to any Contracting Party, or impede the attainment of any objective of the GATT.[85] Additionally, Article 25.3 requires notification of awards "to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto."

If resort to Arbitration under the *1989 Improvements* was sparse, use of Arbitration for dispute resolution under the DSU has been positively scant. Since the end of the Uruguay rounds, when the DSU was adopted in 1994 there has been only one arbitration under Article 25, *United States — Section 110(5) of the US Copyright Act*.[86]

While Article 25 of the DSU offers a more or less complete (if rarely used) alternative to the typical dispute settlement procedures in the WTO, there are some other, more limited (and more successful) references to arbitration in the agreement. Article 21.3(c) of the DSU provides for mandatory, binding arbitration of the reasonable period of time for compliance with DSB recommendations and rulings. Arbitration under Article 21.3 is not subject to mutual agreement between the parties—it is automatic upon the failure to agree on a reasonable period of time for compliance.

Article 22.6 provides for similarly limited, but mandatory arbitration:

> . . . if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth . . . have not been followed where a complaining party has requested authorization to suspend concessions or other obligations . . . the matter shall be referred to arbitration.

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4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

[85] *See* Article 3.5 of the DSU

[86] WT/DS160/ARB25/1. The Award of the Arbitrators was notified to the DSB and the TRIPS Council on 9 November 2000.

**OF ELEPHANTS AND SEA ELEPHANTS**

So we may see that the DSU makes explicit provision for arbitration in some circumstances. We also see that, even absent arbitration, the basic WTO dispute mechanism shares many characteristics with arbitration (particularly with regard to the establishment of panels). But in either case, is it really arbitration, and if so is it *international arbitration?*

Arbitration and international arbitration are two substantially different beasts, in spite of their similar nomenclatures. Jan Paulsson illustrated the danger of overlooking this distinction by pointing to a simple example: elephants and sea elephants. Clearly it would be folly to suggest that the two are the same creature or even simple variations of the same simply because both are called elephants.[87] Paulsson lays out the questions normally asked when comparing arbitration to courts—"Is it quicker? Is it less expensive? Is it less disruptive because it is confidential and informal? Does one get better decisions from persons selected for their relevant expertise?"—and then brushes these questions aside as relatively insignificant in the international context.[88]

Similar semantic traps can potentially be found elsewhere, however. For example, among the opening paragraphs of this paper are the seemingly uncontroversial statements that WTO disputes are, by definition, international, and that arbitration is sometimes employed in the resolution of those disputes.[89] Since WTO disputes are

[87] *See* Paulsson, *supra* at 1.

[88] The salient point is that in the national context comparing the relative virtues of arbitration vs. the traditional judicial process makes sense. But in the international context the prospect of selecting which nation's courts will hear a dispute, combined with the grim state of worldwide recognition and enforcement of foreign judgments, these questions become virtually moot. International commercial arbitration is the only realistic option available. *See* Paulsson *supra.*

[89] *See supra* notes 3 and 5.

commercial in nature (dealing primarily with international trade), it seems that we are *prima facie* dealing with international commercial arbitration. The concern then becomes, is this international arbitration an *elephant* or is it possibly a *sea elephant* — or perhaps some other kind of elephant altogether?

Paulsson specified the defining difference between arbitration and international arbitration (elephants and sea elephants, as it were). It is a matter of neutrality. "We can be certain that lawyers' cupboards across the globe are filled to bursting with myriad contracts referring to international arbitration *even though each side actually preferred courts.*"[90] But since each party equally prefers to stay out of *his opponent's* courts, international arbitration is left as the only mutually acceptable option.[91]

Thus, Paulsson argues that the typical debate over the virtues of arbitration vs. traditional court proceedings is irrelevant in the international context when contrasted with the overriding fact that no alternative exists. "It is unlikely," according to Paulsson, "in our lifetimes, that we will see the emergence of Global Commercial Courts having compulsory jurisdiction."[92]

But the Dispute Settlement Body of the WTO, in its limited context, seems to be just such a court. That is not to put too fine a point on Paulsson's argument. He is, of course, referring to the much wider world of international commercial dispute resolution. But it seems that at least in the limited context of trade disputes between Contracting Members of the WTO, some of Paulsson's insights may carry less force. And here we

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[90] Paulsson, *supra* at 1.

[91] *Id. at 2.*

[92] *Id.*

see the importance of his observation about the de facto monopoly enjoyed by international commercial arbitration. As the monopoly loses force—as a legitimate alternative becomes available—the correlated significance of all those questions about arbitration that became irrelevant in his calculation suddenly springs back to life. We may once again ask: *would arbitration be better?* "Is it quicker? Is it less expensive? Is it less disruptive because it is confidential and informal? Does one get better decisions from persons selected for their relevant expertise?"[93]

**Speed and Efficiency**

Unlike traditional court systems, dispute resolution in the WTO is a relatively speedy process. When a Member wishes to initiate proceedings it must first begin consultations with the opposing party in an attempt to bring about a diplomatic solution.[94] Failing such a solution, members may request a panel after sixty days.[95] The panel must complete its report within nine months (including adoption of the report by the DSB), unless otherwise agreed by both parties.[96] If the panel's report is appealed, three months is added to that time-frame for the Appellate Body to conduct its proceedings.[97] Thus, from establishment of a panel to adoption of a report, all proceedings should be completed within a year. Members then have fifteen months to bring their laws into

[93] *Id.*

[94] Jackson, *supra* at 152.

[95] *Id.*

[96] *Id.*

[97] *Id.*

compliance with their WTO obligations, again unless otherwise agreed by the parties.[98] It should be noted that coming back into compliance with obligations often requires local legislative action, hence the seemingly gracious time allowance.

While arbitration frequently provides a speedy alternative to overburdened court systems, it likely would not have such a dramatic impact with regard to WTO disputes. This is probably a simple function of the exclusivity of the WTO dispute settlement process. Being only open to WTO Members dramatically reduces the potential for disputes. Private parties are simply not able to bring claims, clogging up the dockets of the WTO dispute settlement system. This exclusivity is the subject of harsh criticism,[99] but surely it cannot be faulted on efficiency grounds.

**Selecting Arbitrators**

Here it seems that little could be gained by implementing a more traditional arbitration mechanism in the WTO dispute settlement process. While the procedures in place bear a great deal of resemblance to traditional court proceedings (e.g., guaranteed appeals, development of a common-law), the selection of members of panels works very much like the selection of arbitrators in many arbitrations. Panelists are appointed by the parties.[100] While the WTO Secretariat usually provides the parties with a list of qualified individuals (similar to institutional arbitration), the panelists are not limited by the list

[98] *Id.*

[99] *See, e.g.,* Motta & Diego-Fernández at 296-99, *see also* Georgios I. Zekos, *A Examination of GATT/WTO Arbitration Procedures,* 54 Dis Res Jnl 72 (1999).

[100] Guohua et. al, *WTO Dispute Settlement Understanding: A Detailed Interpretation* 86 (2005).

and may select any person to serve on the panel (similar to ad hoc arbitration).[101] Much like the arbitrators in most commercial arbitrations, panelists are selected with reference to criteria of subject-matter expertise and competence to hear a particular dispute.[102] Where Members cannot agree to panelists within 20 days of establishment of the panel, the Director-General determines the composition of the panel.[103]

Arbitration does not seem to bring much change to the table, good or bad, in this area. WTO panels and arbitral tribunals are already established in very similar ways.

**Res Judicata**

Here again it seems that arbitration could bring little improvement, or even change to the WTO. This is not because claims that have been settled by the WTO DSB are immune from relitigation in another forum. Rather, the actors themselves are probably immune from being pulled into a forum anywhere other than that specified by the WTO Dispute Settlement Understanding because of the doctrine of sovereign immunity.[104] Foreign sovereign immunity can be waived, which has other implications with regards to arbitration and enforcement. But even if WTO dispute resolutions lack res judicata, that does not create any substantial concern for WTO members.

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[101] *Id.*

[102] *Id.* at *85.*

[103] *Id.* at *86.*

[104] As with res judicata, an in depth treatment of sovereign immunity is beyond the scope of this paper. In simple terms it is the principle that that a sovereign or state is immune from civil suit or criminal prosecution. The US recognizes this doctrine under the Foreign Sovereign Immunity Act 28 USC §1604.

**Confidentiality**

Although the WTO dispute settlement process affords some measure of confidentiality to members, it falls short of that afforded most arbitrations.[105] Proceedings are confidential and are generally closed even to other WTO members.[106] However, panel reports are made readily available on the internet, not just to other member states, but to the general public.[107] Additionally, while the *proceedings* are closed and confidential,

> The agreement to arbitrate has to be disseminated to all Members of the WTO, in contrast with the established principles of arbitration, where there is a need only for the parties' agreement to arbitrate. Thus, third parties can become parties to the arbitration and this is reminiscent of litigation procedures under civil law. The arbitration award is submitted to the DSB, and hence the award becomes a subject of consideration by all the Members of the WTO, rather than just of the parties taking part in the arbitration. The discreet character of arbitration is abolished by this provision.[108]

This is arguably a point on arbitrations side of the ledger. But that depends on whether confidentiality is desirable, which depends on whom you ask. Dealing exclusively with national governments, confidentiality poses serious, perhaps insurmountable obstacles. Democratic societies often insist on a certain measure of openness from their governments. It is hard to imagine that the results of an arbitration

[105] UNCITRAL Rules provide for confidentiality of the award as well as the hearing. Under ICC awards are not made available by the Secretariat, but the parties are not precluded from making such a disclosure.

[106] With an important recent exception in *EU — Beef-hormones* in which proceedings were not closed.

[107] Jackson, *supra* at 154.

[108] Georgios I. Zekos , *Arbitration as a Dispute Settlement Mechanism Under UNCLOS, the Hamburg Rules, and WTO*, Journal of International Arbitration, (Kluwer Law International 2002 Volume 19 Issue 5) pp. 497 - 504

between the US government and another party could withstand a simple Freedom of Information Act[109] request.

Additionally it is not entirely clear that the parties necessarily prefer confidentiality. As mentioned, the DSB, especially the Appellate Body, is concerned with consistency in rulings.[110] This develops a sort of WTO common-law[111] that serves to clarify the various agreements, allowing Members to better coordinate their laws and actions so as not to come into conflict with their WTO obligations. While parties may, in an individual case, prefer that details be kept confidential, the long-term development of WTO law, and clarification of rights and responsibilities benefits all members.

As an aside, particular agreements, such as TRIPS, which deals with intellectual property, include special confidentiality measures to protect trade secrets.[112] Special rules have developed to address the need for confidentiality in narrow cases such as these.

**Enforceability**

The key to international arbitration is the New York Convention. In enforcement proceedings, foreign arbitral awards are not subjected to the vague more-than-a-courtesy-

[109] 5 USC Chapter 5 § 552 (2008) — This act allows for the full or partial disclosure of previously unreleased information and documents controlled by the United States Government.

[110] *See supra* note 70.

[111] *See supra* note 72.

[112] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) — The TRIPS Agreement requires undisclosed information — trade secrets or know-how — to benefit from protection. According to Article 39.2, the protection must apply to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret. — available at http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited December 2, 2009).

less-than-an-obligation[113] analysis applied to foreign judicial decisions. With few minor exceptions, these arbitral awards are simply enforced automatically. The same cannot be said of foreign judicial decisions, and certainly is not true for WTO panel and Appellate Body decisions. Mexico cannot come into a U.S. court and have the court force the U.S. government to comply with a WTO panel recommendation. The New York Convention does not apply to any decisions of the DSB, even where the parties made use of "arbitration" procedures.

Moving to a traditional international arbitration system in the WTO could theoretically "resolve" this situation. Typically sovereign immunity laws would prevent a state party from being forced into a foreign court. However, foreign sovereign immunity can be waived. And waiver by implication may arise in situations:

1) where a foreign state has agreed to arbitration in another country;
2) where a foreign state has agreed that the law of a particular country should govern; and

[113] The United States Supreme Court's famous definition of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895).

> "No law has any effect beyond the limits of the sovereignty from which its authority is derived. The extent to which one nation shall be allowed to operate within the dominion of another nation, depends upon the comity of nations. Comity is neither a matter of absolute obligation, nor of mere courtesy and good will. It is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignty to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided."

3) where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.[114]

U.S. courts have typically been unwilling to find the agreement to arbitrate alone to be an implicit waiver of foreign sovereign immunity.[115] But combined with a treaty providing for court enforcement of arbitration agreements and awards, such as the New York Convention, courts have found such a waiver to have been made.[116]

So it is conceivable that converting to a traditional international arbitration scheme would transform WTO rulings from a system where compliance is effectively voluntary to a large degree, to one where enforcement is simply a matter of bringing an enforcement proceeding in the courts of the offending member state and invoking the New York Convention.

But this seems to be something of the tail wagging the dog. One might question whether the WTO would ever have been formed if it involved such a serious affront to sovereignty. Indeed, the WTO is extremely respectful of national sovereignty. For example, unlike the UN, decision-making at the WTO is by consensus.[117] Unlike the UN General Assembly (but like the Security Council), the U.S. can unilaterally prevent agreement in the WTO.[118] Additionally, the WTO does not *punish* Members that do not

[114] HG.org: Worldwide Legal Directories, *A Pimer on Foreign Sovereign Immunity* (2006), *available at* http://www.hg.org/articles/article_1223.html.

[115] *Id.*

[116] *Id.*

[117] Lawrence, *supra* at 14.

[118] *Id.*

comply with their obligations. Members are not fined for violations; they do not pay damages. They are not *retaliated* against, but rather "concessions are suspended."[119]

If enforcement is viewed in a vacuum as a universal good, traditional arbitration appears to offer a substantial improvement to the current system. But when the correlated trade-offs in respect of national sovereignty is added to the equation, international arbitration, with its New York Convention-powered enforcement mechanism, loses a great deal of its appeal—potentially enough to lead to a mass exodus of signatories to the treaty unwilling to cede so much sovereignty to the jurisdiction of the courts of other nations.

## CONCLUSION

International arbitration is an indispensible tool for justice and dispute resolution in an increasingly globalizing world. As Paulsson described it, "In the transnational environment, international arbitration is the only game. It is a de facto monopoly." And, indeed, in most situations his conclusions are difficult to dispute. But in the narrow universe of WTO disputes, it seems that international arbitration is a poor fit. "You may have your doubts about the need for arbitration, or indeed the value of it," says Paulsson, "if you live in a country where the courts give justice quickly and surely at no cost to those whose rights have been violated. But in the international system such courts—good or bad—simply do not exist."[120]

[119] *Id.* at 14-15.

[120] Paulsson, *supra* at 16.

This author disagrees. While the WTO dispute settlement mechanism is probably not exactly what Paulsson had in mind when he referred to Global Commercial Courts (in fact Paulsson was speaking in the context of courts available to private parties and corporations, of which WTO dispute settlement decidedly is not), the Dispute Settlement Body nevertheless does fit the description to a large degree. The WTO dispute settlement mechanism is a "distinctive form of arbitration combined with a variation of judicial review.[121] "The unique feature of the WTO is that, unlike many international regimes, it has an adjudication process that is mandatory and binding."[122]

Like any system for dispute resolution, the WTO is fraught with problems. The WTO could be improved in innumerable ways, from the complete lack of private access to difficulties with enforcement to inequities between developing countries and behemoths like the European Union. But several factors preclude arbitration from being an effective antidote to the WTO's dispute resolution ailments.

The vast majority of international commercial arbitrations are the result of *les clauses compromissoires*—contractual arbitration clauses.[123] This allows the parties to a contract to anticipate potential disputes and tailor any future dispute resolution procedures to their needs. Applicable procedural and substantive law can be decided beforehand, as can the seat of the arbitration. The number of arbitrators and the method of their selection can be decided. The parties can determine whether arbitration should be an option of first resort, or whether certain other avenues must first be exhausted. All this and much more can be determined before a dispute has arisen, while the parties are

[121] Lawrence, *supra* at 11.

[122] Rufus Yerxa & Bruce Wilson, *Key issues In WTO Dispute Settlement* 3 (2005).

[123] *See supra* note 13.

still friends, so to speak. And it can be determined *with reference to a particular transaction* allowing for the aforementioned tailoring.

WTO dispute resolution does not lend itself to this kind of case-by-case customization. Laying out arbitral procedures in a GATT agreement is akin to a one-size-fits-all *clause compromisoir* applicable to every single future commercial contract of any kind. Such an arbitration clause ignores the differences and needs of the hundreds of unrelated businesses operating in thousands of different business sectors. There is simply no way to anticipate the present and future needs of so many disparate actors with a single arbitral procedure the way parties are able to anticipate their needs on a contract-by-contract basis. The relative flexibility normally associated with arbitration vis-à-vis judicial proceedings is eviscerated in the WTO context.

Furthermore, as Paulsson illustrated, the most important feature of international commercial arbitration is not the superiority of its process or its result. It is not its speed, its efficiency, its confidentiality. Enforcement is the key. International commercial arbitration is the best game in town because it is the *only* game in town.

If the New York Convention is not a guarantee that an award will be enforced against a party in that party's home state, it is at least the only hope on which parties to an international commercial dispute can consistently rely. But this is not the case in the WTO context. Not only does the GATT provide a mandatory and binding adjudication process without resort to true arbitration, application of the New York Convention as an enforcement mechanism in this context would be highly undesirable and possibly unworkable. The WTO would probably not exist today with a dispute settlement system in place containing an enforcement mechanism that was such an affront to national

sovereignty. The Japanese government will not suffer being dragged into an English court against its will and subjected to enforcement proceedings. The very key to the success of international commercial arbitration, the New York Convention, is insupportable when applied to state actors acting in their capacity as such.

But even if these seemingly insurmountable obstacles to implementing true arbitration in the WTO did not exist, there nevertheless seems to be very little to recommend arbitration in this context. Disputes under the DSU are not characterized by backlogs and delay as is common with traditional adjudication. Its streamlined procedures and artificially limited access (i.e., exclusion of private parties) ensures relatively speedy resolution that could probably not be improved upon substantially, if at all, by traditional arbitration.

The confidentiality and discrete nature of arbitration, while potentially attractive to individual parties in certain cases, would disrupt the common-law-like system that has evolved under the DSU. This respect and weight afforded precedent by the panels and appellate body enables all parties to better interpret the various GATT treaties and anticipate future outcomes. This allows nations to act with confidence, reducing transaction costs and, as a result, increasing international trade.

The other primary features of arbitration that set it apart from and make it attractive in comparison to traditional adjudication, res judicata and party-selected arbitrators, are similarly inapplicable to WTO dispute resolution. Res judicata is simply unnecessary for state actors, as foreign sovereign immunity leads to the same end result, i.e., it prevents a party from relitigating a claim in a local court after an unsatisfactory

result from the WTO process. Sovereign immunity actually goes a step further and prevents any kind of local litigation at all.

And since panel members under the DSU are selected by more or less the same means and the same criteria as is typical in most institutional arbitrations, this too provides little incentive for an arbitration-centric overhaul of the WTO dispute resolution mechanism.

If there is one overriding argument against the increased use of arbitration within the WTO, it is Article 25 of the DSU. Arbitration is explicitly provided for as an alternative means of dispute resolution in Article 25. Yet since the DSU went into effect in 1994 it has been used only once. Of course, one can speculate on the reasons for this. Perhaps if Article 25 arbitration was *as* confidential as traditional arbitration it would be more attractive. Maybe if arbitration agreements could somehow be customized prior to the emergence of a dispute, more Contracting Members would wish to take advantage of it. But these arguments beg the question. The majority of disputes within the WTO have broader effects than the immediate results on the parties to the dispute. Arbitral awards, for example, are unlikely to generate legal principles that will be useful in future disputes.

Arbitration in the WTO is not exactly international arbitration. It lacks some of the characteristics that make international arbitration almost magical in its superiority over competing methods of dispute resolution. But the primary features of arbitration it lacks, confidentiality and the applicability of the NY Convention for enforcing awards, appear to be neither necessary nor even desirable in the context of trade disputes between Contracting Members of the WTO. So, while there is not a lot of arbitration going on in the WTO these days, that does not seem to be such a bad thing.